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No. 1503

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

GEORG FRIEDRICH RODIEK,
Defendant in Error.

Brief of Defendant in Error.

Error to the United States District Court of Hawaii.

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Error to the United States District Court for Hawaii.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The defendant in error, on March 28, 1907, made petition for naturalization to the United States District Court for the Territory of Hawaii. He had then resided in Hawaii for a period beginning more than five years prior to the operation of the Organic Act providing a government for that Territory (31 Stat. L., p. 141) and continuing to the date of his petition (Transcript of Record, p. 4, par. "Tenth"), but had never made declaration of intention to become a citizen of the United States previous to said petition (Transcript, pp. 4, 25).

The United States District Attorney contested the petition on the ground that the present law (Act of Congress of June 29, 1906, ch. 3592; Fed. Stat. Ann., Supp. 1907, p. 230) requires a declaration of intention two years before admission to

citizenship; while the applicant relied on the following provision of the Organic Act, 31 Stat. L., p. 141, sec. 100 (see Transcript, p. 8, Decision):

> "That for the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said Islands at least five years prior to the taking effect of this Act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said Islands."

The District Court overruled the objection and granted the petition (Transcript, pp. 13, 17), and the matter comes here on Writ of Error taken by the United States attacking the order and judgment aforesaid (Transcript, pp. 31, 21).

ARGUMENT.

I.

In terms the Assignments of Error (Transcript, pp. 21, et seq.) raise but one specific question, Did the Act of Congress of June 29, 1906, relating to naturalization, repeal Section 100 of the Act of Congress of April 30, 1900, providing a government for Hawaii? The contention of the defendant in error is that it did not, either directly or by implication.

THE NEW LAW IS A GENERAL STATUTE NOT AFFECTING THE *SPECIAL* PROVISIONS OF THE ORGANIC ACT; GENERALIA SPECIALIBUS NON DEROGANT:

Rodgers v. U. S., 185 U. S., 83, 87-89; Id., 83, syllabus;
Ex. p. Crow Dog., 109 U. S., 570-571;

1 Sutherland, Stat. Constr., Lewis' ed., sec. 274; pp. 526-527, 531-532.
Id., sec. 275, pp. 531-532;
Re Matsuji, 9 Hawaiian, 404.

THE DRAG-NET CLAUSE OF THE NEW LAW (34 Stat. L., 603; Fed. Stat. Ann., Supp., p. 237, sec. 26) IS INEFFICIENT AND DOES NOT COVER THE SPECIAL PROVISIONS OF THE ORGANIC ACT (sec. 100):

1 Sutherland, as above, sec. 256, p. 491;
Id., sec. 274, pp. 529-530.

THE REPEALING CLAUSE CAN EFFECT A REPEAL OF THE SPECIAL PROVISION OF THE ORGANIC ACT ONLY BY IMPLICATION; AND THE PRESUMPTION IS AGAINST SUCH REPEAL:

See authorities above cited;
Chew Heong v. U. S., 112 U. S., 549-550;
1 Sutherland, as above, sec. 247, p. 465;
Re Matsuji, 9 Hawaiian, 404;
Rep. v. Edwards, 12 Hawaiian, 58.

THE COURTS, UNDER SUCH PRESUMPTION, WILL ENDEAVOR TO HARMONIZE THE TWO ACTS AND SUSTAIN THE SPECIAL STATUTE:

1 Sutherland, as above, sec. 258, pp. 494-495;
Id., sec. 267, pp. 510-511.

Judge Dole's decision, appealed from, covers these points briefly and thoroughly; we refer to it at length (Transcript, pp. 8-13).

These principles require something more than what appears in the repealing clause, in order to set aside the special provisions which Congress made for Hawaii at a time when its attention was especially directed to Hawaiian conditions: See language of the New Jersey Chancellor quoted by Justice Brewer in *Rogers v. U. S.*, 185, U. S., 83, 88; also *Chew Heong v. U. S.*, 112 U. S., 536, 550. And further, the fact that the repealing clause undertakes to specify just what particular provisions of the former *general* law of naturalization it intended to repeal (namely Rev. Stat., secs. 2165, 2167, 2168, 2173, and Act March 3, 1903, ch. 1012, sec. 39) suggests that the new law is amendatory of the old rather than intended to create an entirely new system.

The District Attorney, however, discovers in the recent Act of Congress relating to naturalization, a clear intent to create an entirely new system of law on this subject, to apply to all places and to all persons,—an obvious purpose "to reconstruct and remodel" the general law and, so, it is argued, to do away with all other and special provisions.

We are confident, however, that it requires something more than such expressions of the Act as "uniform rule," "and *not otherwise*," "*throughout* the United States," to dispose of the question which the Government has raised; and the more the Act is dissected and compared with the former law, the more that confidence is justified. These generalities are not decisive of the case, any more than are numerous other expressions and phrases of the former law which are copied exactly in the amendatory Act.

But what do we find in the new law so different from the old? Of what does the new "system" consist? What is there so

revolutionary in the present "scheme" as to bring it within the principle of the New Jersey and Federal cases relied on by the Government?

See: Decision of Dole, J., Transcript, pp. 10-11.

So far as concerns mere matters of procedure,—and the question here is of that class—the new law is essentially identical with the old law as administered by Court practice. And, so far as the new Act embraces matter not contained in the former general law of naturalization, such new matter is largely departmental regulation, ministerial for the most part, made advisable for simplicity's and for harmony's sake because of the recent creation of a new executive department, that of Commerce and Labor, having rights and duties in regard to aliens (see Fed. Stat. Ann., Supp. 1907, p. 229, sec. 1). Other new provisions of the Act, but by no means affecting the former system of naturalization procedure, are: an attempt to prevent the use of naturalization certificates for *mala fide* purposes of exemption from military service abroad (Id., pp. 234-235, sec. 15), an attempt to discourage naturalization for fraudulent election purposes (Id., p. 232, sec. 6), and discrimination against anarchists and polygamists (Id., p. 232, sec. 7), which amounts to a more direct way of dealing with these classes of undesirables who could never have been naturalized under the former law, once their disqualification appeared or were proved,—as it has equally to be proved under the new law.

A parallel column comparison of the new enactment with the former general law follows:

		Fed. Stat. Ann. Supp. 1907, p. 229, &c:	*Rev. Stat. p. 378, &c:*
Sec.	1	Duties of new dep't of Com. & Labor	not provided for, unnecessary
"	2	Do.	do.

"	3	Courts, jurisdiction	covered by sec. 2165, subdv. 1st and 19 Stat. L. 2.
"	4	Subd. 1st Declaration of intention, qualifications	covered by sec. 2165, subdv. 1st.
		subdv. 2d Petition for certificate	not expressly covered, but matter of court practice: see Webster, Naturalization 316, 317, forms; 2 Loveland, Forms Fed. Pr. 2156, 2157.
		subdv. 3d Oath, allegiance,	covered by sec. 2165, subdv. 2d.
		subdv. 4th Evidence, residence	covered by sec. 2165, subdv. 3d, sec. 2170.
		subdv. 5th Renunciation, titles,	same as sec. 2165, subdv. 4th.
		subdv. 6th Widows, minors	covered by sec. 2168.
"	5	Notice, hearings, &c.	not expressly covered, but matter of court practice.
"	6	Filing and docketing petition, &c.	do., except new law prohibits issuance of certificates during 30 days before general elections.
"	7	Anarchists, polygamists	polygamists not expressly prohibited but impliedly by oath, and never admitted when evidence disclosed disqualification; as to anarchists, see 32 Stat. L., part I, 1222, sec. 39.

"	8	English language	no special requirement, but required by universal policy of courts in administering the law.
"	9	Final hearing	no special requirement, but observed in practice.
"	10	Evidence, 2 witnesses,	do.
"	11	Examination in opposition	do.
"	12	Court files in duplicate,	mere matter of office practice, not specially provided for before.
"	13	Fees of Clerk,	do.
"	14	Binding of papers,	do.
"	15	Cancellation of certificate	not specially provided for but accomplished under Fed. equity jurisdiction; see 1 Foster, Fed. Pr. 26, sec. 11, 42 Fed. 417.
"	16-25	Criminal provisions,	see secs. 5395, 5424-5429.
"	26	Repealing clause	.....
"	27	Forms	.....
"	28	Certified copies	mere office practice not provided for.
"	29	Appropriation	.....
"	30	Naturalization of persons owing allegiance,	see secs. 2167, 2172.
"	31	Effect	.....

Thus, it is seen, the new law, so far as concerns the matter here in question, namely, declaration of intention, is identical

with the old: cf. Fed. Stat. Ann., Supp. 1907, p. 230, subdv. 1st, with Rev. Stat., sec. 2165, subdv. 1st: "*He shall declare on oath* * * * *two years at least prior* to his admission." It, apparently, was not to change such matters as those that the recent statute was enacted; but, rather, Congress seems to have had in mind : (1) the propriety of giving the new Department of Commerce and Labor, created *inter alia* specially to deal with aliens, some duties pertaining to naturalization; (2) to discourage the naturalization of anarchists and polygamists; (3) to discourage naturalization for purposes of evading foreign military service; and (4) to discourage naturalization for fraudulent election purposes.

Now, further, turning to the general law as it stood before the recent amendatory Act, we find a number of salutory provisions which were not expressly repealed by the new law, and the failure to repeal which (with the other provisions which were expressly repealed) induces the strong belief that Congress did not intend this new Act to supercede all other laws whatever on the subject of naturalization. Can it be pretended that the provision, of 45 years' standing, for the naturalization *without previous declaration of intention* of aliens honorably discharged from military service, Rev. Stat., sec. 2166, was to be swept away by this "entirely new system," this general "scheme" by which the former system was wholly "reconstructed" and "remodeled?" Can it be seriously contended that a Legislature, the decline of whose merchant-marine was so strongly urged upon it at the last two sessions of Congress, intended "clearly" to abolish the wise policy of the past quarter-century as to the naturalization of seamen, set forth in Rev. Stat., sec. 2174? And, still more violent the presumption, can it be presumed from the mere use of the general expressions such as "uniform," "not otherwise," et cetera, that such repeal was intended without specific enumeration of these sec-

tions as was made in the case of other sections of the former general law (Repealing clause: Fed. Stat. Ann. Supp. 1907, p. 237, sec. 26). And if the recent enactment was not intended to wipe out all previous legislation on the subject and supply an entirely new "system" then there is no meat left in the District Attorney's contention. The New Jersey and Federal cases relied on by the Government (see Transcript, p. 10) have no application because the late law was not "designed as a complete scheme," and, with greater reason, because if such design were possible as a matter of interpretation from the internal evidence furnished by the Act itself, still the question is a doubtful one and the intent is not that "clear intent" which the rule relied upon requires. The rule is an exception to the rules on which we rely in the introduction to our brief, and as an exception must be construed strictly.

Thus the new Act, in its special clause of repeal, passed over Rev. Stat., sec. 2166 (and also 28 Stat. L., p. 124: naval and marine service) which in case of certain persons dispensed entirely with the two-year declaration of intention, and it also passed by Rev. Stat., sec. 2174, which in case of other persons required only 3-years service in the merchant-marine instead of the usual 5-years residence. If Congress, in its recent enactment, may be regarded as not having touched with profane hands those special provisions as to places and persons, which have been considered as wise policy for more than a quarter-century, no more, we maintain, can Congress be held to have repealed that special provision of the Organic Act as to persons and places, upon which the application relies, and for the continuance of which as the law of this special case, all the presumptions and rules of construction argue strongly as against the mere doubt which the Government's argument has suggested. The applicant should be given the benefit of these rules and presumptions in his honest desire to become an Ameri-

can citizen of Hawaii,—of Hawaii where eligible candidates are so comparatively few as reasonably to have caused Congress in "providing a government for the Territory" to offer special encouragement to the maintenance of as large a proportion of *citizens* as possible, in a community which must, under the best conditions, remain largely pro-Asiatic. The provision of the Organic Act was one of wisdom and foresight, as was the time-honored policy toward military service and service in the merchant-marine; citizenship in our new island possessions is no less worthy of encouragement, no less important, than are military service and commerce.

> "The policy which sought the development of the country by inviting to participation in all of the rights, privileges and immunities of citizenship those who would engage in the labors and endure the trials of frontier life, which has so vastly contributed to the unexampled progress of the nation, justifies the application of a liberal rather than a technical rule in the solution of the question."
>
> *Boyd v. Neb.*, 143 U. S., 135, 179; S. c., 36 L. ed., 116.

II.

At the opening of our argument we say that the assignments of error raise but one *specific* question, namely, as to the repeal of section 100 of the Organic Act creating a government for Hawaii. And this question is the only one that was raised in briefs and argument in the Court below. The United States District Attorney for the Northern District of California, who has lately come into the case, has, however, in his brief, urged the new point of the constitutionality of Section 100 of the Organic Act, which we beg leave to discuss briefly in closing.

His authorities in this behalf are very meagre and unsatisfactory, and, we submit, inconclusive. The contention of un-

constitutionality may be disposed of by considering the preposterous conclusions to which it would carry us. It would wipe out at one stroke all "collective naturalization," so-called, on acquisition of foreign territory by conquest, cession or free gift, or on admission of a territory of the United States to Statehood,

Van Dyne, Citizenship: 234-248;
6 A. & E. Enc. L., 2nd ed., 27 and notes;

because, according to the California District Attorney's argument, uniformity under this provision of the Constitution must apply to the whole territory of the United States "geographically speaking"; upon such reasoning also, a newly acquired territory might be left without citizens or possibility of citizens until a period of two years had elapsed.

The plenary power of Congress over the territories has been established in many cases, has been reaffirmed in the recent Insular cases, and in *Boyd v. Nebraska*, 143 U. S., 135, was declared in a case where naturalization was effected in a manner quite exceptional and special and not under any "uniform" rule:

Boyd v. Neb. 143 U. S., 169-170; S. c., 36 L. ed., 112-113, 114.

The Constitutional power of Congress "to establish an uniform rule of naturalization throughout the United States," is no narrower than the Constitutional requirement of uniformity of duties and imposts, and in regard to the latter the holding is that:

> "The island of Porto Rico by the treaty of cession, became territory appurtenant to the United States but not a part of the United States within the revenue

clauses of the Constitution such as Art. 1, sec. 8, requiring duties, imposts and excises, to be *uniform* throughout the United States."

Downes v. Bidwell, 182, U. S. 244, syllabus by Brown, J., S. c., 45 L. ed., 1088.

"The power over the Territories is vested in Congress without limitation, and * * * this power has been considered the foundation upon which the territorial government rests."

Id., 182, U. S. 267-268; S. c., 45, L. ed., 1099;
Id., 182 U. S., 290, concurring opinion; S. c., 45, L. ed., 1107, 1108, citing,
Boyd v. Neb., 143 U. S., 135 above.

Numerous examples of want of uniformity (of special laws with general laws), in acts of Congress relating to territories, have passed unchallenged. A single statute relating to naturalization may be cited:

"That any member of any Indian tribe, or nation residing in the Indian Territory, may apply to the United States Court therein to become a citizen of the United States, * * * : and the Confederated Peoria Indians residing in the Quapaw Indian Agency, who have heretofore or may hereafter accept their land in severalty under any of the allotment laws of the United States, shall be deemed to be and are hereby declared to be citizens of the United States from and after the selection of their allotments."

26 U. S. Stat. at L., 99; Act May 2, 1890, ch. 182, sec. 43.

In that statute a special privilege was extended to a particular tribe of Indians resident in a limited locality. Numerous examples of want of uniformity in case of laws applying to territories are cited in the decisions in the Insular cases, and see instances of naturalization by even special statute noted in Van Dyne on Citizenship, 234 et seq., including the case of Hawaii.

The order and judgment granting the defendant-in-error's application for naturalization should be sustained.

Respectfully submitted,

CHARLES F. CLEMONS,
Attorney for Defendant-in-Error.

Honolulu, Hawaii, January 30, 1908.

THOMPSON & CLEMONS,
Honolulu, of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Defendant in Error.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel, that the above-entitled cause may stand submitted without oral argument, on the briefs of the respective parties; counsel for each party to furnish counsel for the opposite party with a typewritten copy of his brief on or before the 30th day of December, 1907, and the printed briefs to be forwarded to the above-entitled Court on or before the 30th day of January, 1908; and, further, that defendant in error may in his printed brief reply to the question of the constitutionality of Section 100 of the Organic Act of Hawaii raised in the typewritten brief of the plaintiff in error.

Dated at Honolulu this 30th day of December, 1907.

THE UNITED STATES OF AMERICA,
By Robt. W. Breckons,
Its Attorney.

GEORG FRIEDRICH RODIEK,
By Charles F. Clemons,
His Attorney.